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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ANTONIO R. BOGAT

Appeal 2008-2770
Application 09/829,225
Technology Center 2100

Decided:¹ April 28, 2009

Before JAMES D. THOMAS, HOWARD B. BLANKENSHIP,
and JAY P. LUCAS, *Administrative Patent Judges*.

THOMAS, *Administrative Patent Judge*.

DECISION ON APPEAL

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 CFR § 1.304, begins to run from the decided date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Data (electronic delivery).

STATEMENT OF THE CASE

This is an appeal under 35 U.S.C. § 134(a) from the Examiner's final rejection of claims 1 through 18. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

Invention

Appellant's invention relates to a "method of operating a web site." A visitor to the web site is identified, either precisely by name, or imprecisely, such as by ascertaining a category to which the visitor belongs. Once the visitor is identified, the web site performs background research on the visitor and, based on this background research, tailors a web page that is delivered to the visitor. Alternately, a tailored email message may be delivered to the visitor. (Abstract 16)

Representative Claim

1. A method of operating a web site, comprising:
 - a) identifying a first visitor to the web site;
 - b) performing first background research on the first visitor;
 - c) based on the background research, selecting first information from a collection of information; and
 - d) transmitting the first information to the first visitor.

Prior Art and Examiner's rejections

The Examiner relies on the following references as evidence of anticipation and unpatenability:

Nehab	US 6,029,182	Feb. 22, 2000
Landan	US 6,449,739 B1	Sep. 10, 2002
	(Filing date Jan. 17, 2000)	
Lemay et al., "Web Workshop JavaScript", Sams.net. 1996, pp. 178-179, 186-191.		

Claims 1, 2, 5, 6, 8 through 11, and 14 through 17 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Lemay. Utilizing this statutory basis, the Examiner also rejections claims 13 and 18 as being anticipated by Nehab. Dependent claims 3, 4, 7, and 12 stand rejected under 35 U.S.C. § 103. As evidence of obviousness as to claims 3 and 4 in a third stated rejection, the Examiner relies upon Lemay in view of Nehab, and as to claims 7 and 12, the Examiner relies upon Lemay and Landan.

Claim Groupings

We note in the principal Brief, separate arguments are presented as to independent claims 1, 5, and 10 within the first stated rejection, although they are presented in an overlapping manner. Separate arguments are presented as to dependent claims 6, 11, 14, and 15 within this rejection. As to the second stated rejection, arguments are presented only as to independent claim 13. As to the third stated rejection, separate arguments are presented as to dependent claims 3 and 4 and, lastly, arguments are presented only with respect to dependent claim 7 as to the fourth stated rejection. Claims 2, 8, 9, 12, and 16 through 18 fall with the respective parent claims since no arguments are presented with respect to them.

Issue

Has Appellant shown that the Examiner erred in finding that Lemay anticipates the respectively argued claims in the first stated rejection; that Nehab anticipates the subject matter of independent claim 13 in the second stated rejection; that the combination of Lemay and Nehab would have rendered obvious the subject matter of dependent claims 3 and 4 in the third stated rejection; and that the combination of Lemay and Landan would have rendered obvious the subject matter of argued dependent claim 7 in the fourth stated rejection?

Findings of Fact

1. According to Appellant's background of the invention statement at Specification page 1, lines 10 through 15, so-called "cookies" were known in the art and were characterized as providing only minimal information to a content provider as to the identity of a user/visitor to a web site. It was also known, as discussed at Specification page 3, lines 24 through 26, that the prior art was known to classify users/visitors to web sites according to well known classification systems or groups. Additionally, Specification page 4 identifies further prior art approaches at lines 4 through 15 that have been used specifically to identify users, such as when they are directed to identify themselves, to have divulged their name and address and other information, the use of cookies to identify a user by serial number and the concept of identifying inferentially users based on other information obtained about the user from various sources. As noted at Specification page 7, lines 17-23, Appellant's use of the customer

information modules and the customer personalization modules depicted in disclosed figure 4 was derived from well known customer information reporting agents and other sources such as city directories according to the prior art approaches.

2. Page 179 of Lemay teaches:

Netscape created cookies as one solution to this problem. A cookie is a chunk of information sent by the server, which can be stored on the client. Cookies are stored with a date they expire and the name of the host from which they came. When the user communicates with the same host later, the data is sent back.

Here are some examples where cookies can be useful:

- They store a user's "preferences" for a Web page. When users return to the page, they can view it in their desired fashion. For example, Netscape's home page uses this technique to turn frames on or off based on the user's preference.
- They can maintain state between CGI scripts or JavaScript programs. For example, a quiz might ask you one question, then load a new page for the next question, storing your score in a cookie.
- They can remember information so that users can avoid entering it every time they access a page. For example, a page that requires a user's name can remember it with a cookie.

Cookies can also be used in JavaScript. You can use them to store information between pages, or even to store information on users' computers to remember their preferences next time they load your page.

Each cookie stores a named piece of information and includes an expiration date. With few exceptions, this date is usually one of the following:

When used to store preferences, a faraway data is usually used
– in essence, it never expires.

When used to maintain state, a data in the near future-typically the next day-is used. In the previous quiz example, a user that came back the next day would have to start the quiz over.

The cookies are stored in a “cookie jar” on the user’s computer. Specifically, each cookie is a line in a file called cookies.txt, usually in the same directory as Netscape itself.

These teachings are confirmed by the statements at page 187 of Lemay that “[y]ou can use cookies to store a preference for the user, or to remember the user when they come back to your page.” Cookies are said to be stored for the current document and that remembering the user may be by name. This is emphasized according to Listing 9.9 at page 188 and the showing at figure 9.6 at page 189. According to the listing at page 188, if the script in the document header does not contain a user name, it prompts the user for the user’s name and then stores the value in the cookie. This script in the body of the document header is then able to greet the user by displaying the user’s name if one has been identified.

3. Nehab’s system for generating a custom formatted hypertext document by using a personal profile to retrieve documents from the Internet yields a personalized document (newspaper) based upon the personalized profile of the user. In this regard Nehab’s Abstract teaches:

A World Wide Web site data retrieval system includes an input device for inputting data and commands to access the World Wide Web, and a memory for storing a Web site data retrieval drive which includes a Web reader, stored Web site address information, stored Web site commands, and stored format information. The memory also stores process steps to connect to a Web site and to issue commands within the connected Web site, and a connection to the World Wide Web. The system includes a processor for launching the Web site data retrieval driver in response to a command to access the World Wide Web. The Web site retrieval driver, upon being launched, (1) launches the Web reader to connect to the World Wide Web via the connection, (2) retrieves the Web site address information and Web site commands, (3) instructs the Web reader to access the Web site based on the Web site address information and Web site commands, (4) downloads Web site data from the Web site based on the Web site commands, (5) stores the Web site data in a linear document, (6) repeats steps 1 through 5 until all addresses in the stores Web site address information have been accessed, and (7) formats the linear document into a personalized document based on the format information.

4. Nehab's personal news retrieval system in figure 1 is also further identified in figure 2 to include within disk 5 personal news profile editor 16 illustrated in figure 4 and a web printer 17 illustrated in figure 6. Personal news profiles are entered utilizing a graphical user interface 19 in figure 2 that is detailed in the parts of figure 9. Figures 3A-D, 6, 7, and 10 illustrate that a plurality of web sites maybe visited according to Nehab's system. Like the use of the graphical user interfaces illustrated in figure 9, figure 5A shows his system entering a learning mode in step S505 to ascertain preferences of a given user utilized to create the personalized document for him. The personal news profile 19 in figures 2, 4 and 6 include what sites to access. This personal news profile 19 is explained at column 7, lines 27

through 32 to contain information as to what sites to access for creating Nehab's personalized newspaper, what sections to retrieve from those sites, rules to be used to determine what data to extract from the sections and the articles therein, rules to determine how to exclude links and how to format and present the newspaper. In accordance with figure 4 as discussed at column 8, a site profile 20 is created by use of a site driver 36 to translate the structure of each accessed web site to a uniform structure defined by site profile 20 which is thereby stored. The illustrated format editor 39 allows a user to specify personalized templates for the newspaper. The illustrated personal news profile editor 16 creates an extraction rule utilized to extract data from each visited web site. HTML formatter 18 in figure 2 is taught beginning at column 13, line 13 to be a separate software package useable with different web browsers such as Netscape, which is specifically taught in Lemay.

5. Landan's Abstract teaches at lines 1 through 7:

A monitoring system allows users to monitor the post-deployment performance of a web-based or other transactional server. The system includes an agent component ("agent") which can be installed on computers ("agent computers") that have access to the transactional server, including computers of actual users of the transactional server.

Figure 1 of Landan shows various agents and agent computers 32, 40, a transactional server under test 30 and a web report server 36 which includes a report generation component 36D. Landan further teaches at column 3, lines 45 through 52:

In accordance with another aspect of the invention, the performance data is monitored substantially in real-time (preferably by the controller) to check for any user-defined alert conditions. When such

an alert condition is detected, a notification message may be sent by email, pager, or other communications method to an appropriate person. The alert conditions may optionally be specific to a particular location, organization, ISP, or other attribute.

Figure 18 shows the overall process from a different perspective and figure 12 shows an e-mail-type alert message. The report generation component 36D in figure 1 is discussed beginning at column 8, line 46 and it is stated at column 8, lines 51 through 54 that the “report server 36 could also be configured to disseminate the reports by email, fax, a push protocol, or other communications method.”

Principals of Law

Anticipation

“A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference.” *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631 (Fed. Cir. 1987). Analysis of whether a claim is patentable over the prior art under 35 U.S.C. § 102 begins with a determination of the scope of the claim. We determine the scope of the claims in patent applications not solely on the basis of the claim language, but upon giving claims their broadest reasonable construction in light of the specification as it would be interpreted by one of ordinary skill in the art. *In re Am. Acad. of Sci. Tech. Ctr.*, 367 F.3d 1359, 1364 (Fed. Cir. 2004). The properly interpreted claim must then be compared with the prior art.

Obviousness

Appellants have the burden on appeal to the Board to demonstrate error in the Examiner's position. *See In re Kahn*, 441 F.3d 977, 985-86 (Fed. Cir. 2006) ("On appeal to the Board, an applicant can overcome a rejection [under § 103] by showing insufficient evidence of *prima facie* obviousness or by rebutting the *prima facie* case with evidence of secondary indicia of nonobviousness.") (quoting *In re Rouffet*, 149 F.3d 1350, 1355 (Fed. Cir. 1998)).

"Section 103 forbids issuance of a patent when 'the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.'" *KSR Int'l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1734 (2007).

The Supreme Court reaffirmed principles based on its precedent that "[t]he combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results." *KSR*, 127 S. Ct. at 1739. The operative question in this "functional approach" is thus "whether the improvement is more than the predictable use of prior art elements according to their established functions." *Id.* at 1740. The Court noted that "[c]ommon sense teaches . . . that familiar items may have obvious uses beyond their primary purposes, and in many cases a person of ordinary skill will be able to fit the teachings of multiple patents together like pieces of a puzzle." *Id.* at 1742.

The Federal Circuit recently concluded that it would have been obvious to combine (1) a device for actuating a phonograph to play back sounds associated with a letter in a word on a puzzle piece with (2) a processor-driven device capable of playing the sound associated with a first letter of a word in a book. *Leapfrog Enters., Inc. v. Fisher-Price, Inc.*, 485 F.3d 1157, 1161 (Fed. Cir. 2007). In reaching that conclusion, the Federal Circuit recognized that “[a]n obviousness determination is not the result of a rigid formula disassociated from the consideration of the facts of a case. Indeed, the common sense of those skilled in the art demonstrates why some combinations would have been obvious where others would not.” *Id.* at 1161 (citing *KSR*, 127 S. Ct. 1727, 1739 (2007)). The Federal Circuit relied in part on the fact that Leapfrog had presented no evidence that the inclusion of a reader in the combined device was “uniquely challenging or difficult for one of ordinary skill in the art” or “represented an unobvious step over the prior art.” *Id.* (citing *KSR*, 127 S. Ct. at 1740-41).

In the absence of separate arguments with respect to claims subject to the same rejection, those claims stand or fall with the claim for which an argument was made. *See In re Young*, 927 F.2d 588, 590 (Fed. Cir. 1991). *See also* 37 C.F.R. § 41.37(c)(1)(vii)(2004).

Analysis

Since we are in general agreement with the Examiner’s application of the prior art of record to the respective claims rejected, we sustain each of the rejections for the reasons set forth by the Examiner. The Examiner’s responsive arguments beginning at page 11 address substantially each

argument made by page number in the 66 page Brief before us. From our broader perspective, we address collectively certain arguments made by Appellant throughout these pages and the 35 page Reply Brief.

The preamble of each independent claim 1, 5, 10, and 13 recites a “method of operating a web site.” Notwithstanding Appellant’s urging in the Brief and Reply Brief among the various rejections that the claims on appeal require that the web site perform the features recited in the body of these claims, the preamble itself does not require a web site per se to perform all of the steps in the body of each independent claim. Indeed, each web site is essentially “operated” by a user in such a manner as to perform the functions of identifying, performing background research, and selecting and transmitting information to the visitors among each of the references relied upon by the Examiner. Appellant’s recognition of the prior art in finding of fact 1 overlaps with the specific teachings and reasoning of the Examiner for each of the respective rejections. In these respects then, we agree with the Examiner’s observations at pages 13 and 14 and pages 20 through 22 of the Answer.

The recitation of a claimed “visitor” to a web site is not required to be a person or to be identified as a person notwithstanding Lemay’s specific teachings of that ability in finding of fact 2 and Appellant’s recognition of that in the admitted prior from the Specification in finding of fact 1. A “visitor” can be a client, a user (by name even), and a user’s computer (ID). Indeed, the claimed first and second visitors in independent claim 1 and its dependent claim 2 are not stated to be different visitors and can be the same visitor at different times.

For claims 1, 2, and 5, for example, that recite first and second information, at least with Lemay, we agree with the Examiner's views that because this reference teaches in finding of fact 2 and is recognized by the Examiner that different frames (parts/segments) of a given web page may be transmitted to the user based upon user preferences, first and second information is clearly taught. Again, first and second information is not required to be different information either. The first and second information can be different information derived from the web site itself as formulated by it when the web site changes the information and therefore conveys different information to the user upon plural, subsequent accesses of the web site.

We are also not persuaded of patentability based upon Appellant's views expressed, for example, at pages 3 and 14 of the Reply Brief that the claims on appeal only require a single visit. We agree with the Examiner's views that plural visits are encompassed by the actual language of these independent claims on appeal (1, 5, 10, and 13). These claims do not require a single transaction or visit per se by a user/visitor.

In addition to the Examiner's remarks with respect to Lemay, we note that the teachings we identified in finding of fact 2 indicates that a cookie is sent by a server and is stored on a client with the name of the host server which sent it. When a user or client communicates with the same host server at a later point in time, the data is sent back to the server. What is stored includes user preferences for a web page to include the ability to turn on or off selectively, certain frames or portions of the page according to user preferences. Information such as quiz answers with respect to a given

client/user also may be stored in a cookie as well. The Examiner's reasoning clearly is persuasive that an individual visitor can be a named person where a cookie stores such information as depicted in Lemay's figure 9.6. As reasoned by the Examiner, these teachings clearly relate to the identification of a "visitor" to a web site, performing background research on them and selecting information from a given web page and transmitting that information in a certain format to that visitor. As to independent claim 10, for example the capabilities of the server ascertaining the identity of the visitor is implicit within the ability of the server to recognize its own cookie that is sent back to it when the user accesses the web site.

From our study of Nehab as reflected in findings of facts 3 and 4, we do not necessarily agree with the Examiner's view that a given web site is constructed based on what the web site thinks the user might like. As apparently recognized by the Appellant, this function is not actively performed by the web page itself but by the software in the system of Nehab looking for particular information and commanding that information be retrieved, if available, from pluralities of web sites selected by the user from the user's computer. In accordance with the Examiner's reliance upon Nehab's teachings at column 8, lines 38 through 67, Appellant admits that this "passage indicates that the web site merely follows the instruction of the user, as in looking for key words specified by the user." Clearly, the artisan would construe such an admission and the functionality of Nehab as part of a method of operating a web site according to the preamble of each

independent claim on appeal. Even the Abstract of Nehab as noted in finding of fact 3 indicates that the memory stores process steps to issue commands within the connected web site to effectively control it to retrieve required information if any and if any is available.

The estimation requirement of independent claim 13, as applied to selected characteristics of a visitor, encompasses what Appellant has already recognized to be in the prior art anyway with respect to what we indicated in finding of fact 1. Moreover, Nehab teaches in effect that all information desired by the personalized document requirements in Nehab may not be retrievable from a give web site, thus causing the system to effectively “estimate” the selected information desired with respect to the user requirements in returning incomplete information. Additionally, the concept of estimation according to Nehab/Lemay (findings of fact 2-4) includes the ability to retrieve exact information when it is available. Thus, in this respect, Lemay clearly would be considered by an artisan to teach the corresponding estimation function in independent claim 5 as well.

The feature of independent claim 13 of asking the visitors whether certain specific information is desired is met by Nehab’s dual teachings as outlined by the Examiner at column 8, with respect to the so-called extraction rule discussed in finding of fact 4 as buttressed by the ability of Nehab’s system to apparently indirectly ask questions according to the graphical user interface requirements shown in various portions of figure 9.

Turning to the third and fourth stated rejections, which are under 35 U.S.C. § 103, our findings in findings of fact 3 and 4 with respect to Nehab and finding of fact 5 with respect to Landan clearly comply with the

combinability requirements as broadly set forth with respect to the above noted case law. Lemay's ability to place within cookies preferences of a user for a customized documents dovetails with the ability of Nehab to provide personalized document in a more encompassing sense.

Additionally, the discussion at column 13 of Nehab that we noted in finding of fact 4 clearly cross references to Lemay's Netscape browser teachings as well. The U.S. Supreme Court requirement according to the above-noted case law buttresses the long held rubric that 35 U.S.C. § 103 merely requires a reasonable expectation of success, contrary to the arguments made at page 59 of the principal Brief on appeal. Likewise, we have identified teachings in this paragraph and from finding of facts 3 and 4 relative to Nehab that clearly indicates to an artisan that Nehab is analogous art within 35 U.S.C. § 103, also contrary to the allegations made at page 62 of the principal Brief.

The Examiner has rejected the subject matter of dependent claims 3 and 4 over the combination of teachings of Lemay and Nehab. These claims merely specify that another web site would be selectable. As outlined above from the teachings we noted from Nehab in findings of fact 3 and 4, this is clearly taught as a capability of his system.

Landon's combinability with Lemay in the fourth stated rejection of representative dependent claim 7 is consistent with the above noted case law. Lemay teaches a kind of data dialog between a web site and a user/visitor. The user demands certain information from the web site such as a specific page and for it to be formatted in a certain manner according to Lemay's teachings of individual user preferences. In a corresponding manner, Landon, as recognized in finding of fact 5 contains teachings of a

corresponding ability of a user, in the form of an agent or agent computer to demand certain monitoring information from a web site (server). The obvious choice of a system administrator to demand this information is taught in Landan, yet the teachings we identified encompass individual users to demand monitoring information as well. Thus, in accordance with the requirement of independent claims 5 and 10, messages are transmitted to the visitor/user/administrator. Landan further indicates that it was known in the art that such messages may be sent by email message as recited in dependent claims 7 and 12 on appeal.

We close our consideration of the issue(s) in this appeal with general comments that the bulk of Appellant's arguments appear to be overly discreet and even speculative, to include the setting up strawman arguments in the form of various analogies. As the Examiner has repeatedly recognized in the responsive argument portion of the Answer, Appellant has continued to invite the Examiner and us to read more into the extremely broad recitations of the various terms in dispute among the independent claims on appeal features that are not encompassed specifically by them or specifically recited. The bulk of Appellant's positions belie an artisan's perspective/studied consideration of the teachings of the respective references relied upon the Examiner.

Conclusion of Law

Appellant has not shown that the Examiner erred in finding that the subject matter of the argued representative claims was not anticipated to the extent respectively rejected over Lemay and Nehab, and that the Examiner

erred in the combinability of these references together and the combinability of Lemay with Landan with respect to the third and fourth stated rejections under 35 U.S.C. § 103.

Decision

The Examiner's rejection of claims 1, 2, 5, 6, 8 through 11, and 14 through 17 under 35 U.S.C. 102(b) as being anticipated by Lemay is affirmed as is the separate rejection under this statutory basis of claims 13 and 18 as being anticipated by Nehab. We also affirm the rejection of dependent claims 3 and 4 within 35 U.S.C. § 103 over the teachings of Lemay and Nehab. Likewise, we also affirm the rejection of claims 7 and 12 under 35 U.S.C. § 103 over Lemay in view Landan. Claims 1 through 18 are unpatentable.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. §1.136(a). See 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

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